Filed 6/27/19 In re G.H. CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re G.H., A Person Coming Under the Juvenile Court Law.	
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. G.H., Defendant and Appellant.	A154647 (Contra Costa County Super. Ct. No. J18-00339)

G.H. appeals from a juvenile court dispositional order declaring him a ward of the court and placing him on probation, with certain terms and conditions, after he admitted to felony false imprisonment (Pen. Code,[1] § 236) and misdemeanor battery (§ 242). G.H. claims that a condition of his probation—requiring him to submit to warrantless searches of his electronic devices for purposes of monitoring his probation compliance—is both unreasonable under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*) and unconstitutionally overbroad. G.H. additionally asserts, via supplemental briefing, that imposition of a restitution fine at disposition without a judicial determination of his ability to pay violated his due process rights as recently explicated in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). We affirm.

[1] All statutory references are to the Penal Code unless otherwise specified.

I. BACKGROUND

According to the dispositional probation report in this matter, police officers responded on December 19, 2017, to a report of a stolen phone. The victim explained that he was standing at the bus stop holding his cellphone when L.M., who was walking by with G.H., snatched the phone from his hand. When the victim ran after the minors, attempting to retrieve his phone, L.M. struck him four times on his left ear with a closed fist and pushed him to the ground. G.H. then kicked the victim twice before the two minors fled. After a bystander pointed the police in the right direction, one of the officers observed G.H. deposit the victim's cellphone into a potted plant and the minors were arrested. The victim, who positively identified both L.M. and G.H., was observed with a bleeding abrasion to the back of his left ear, an abrasion to his right elbow, and bleeding and bruising to the center of his lower back.

As a result of this incident, the San Francisco County District Attorney filed a juvenile wardship petition against G.H. pursuant to Welfare and Institutions Code section 602, subdivision (a). In March 2018, G.H. admitted the above-described charges. The juvenile court sustained the related allegations and transferred the matter to Contra Costa County for disposition. At the dispositional hearing in June 2018, G.H. was adjudged a ward of the juvenile court and was placed in the home of his parents under probation supervision, with certain terms and conditions.

This appeal followed. After briefing was completed, we granted G.H.'s request to file supplemental briefing to address the decision in *Dueñas*, *supra*, 30 Cal.App.5th 1157, filed on January 8, 2019. Both parties submitted supplemental briefs.

II. DISCUSSION

A. The Electronic Search Condition Is Reasonable Under Lent

At the dispositional hearing in this matter, the juvenile court imposed a number of probation conditions, including the following electronic search condition: "You must submit your cell phone or any other electronic device under your control to a search of any medium of communication reasonably likely to reveal whether you are complying

with the terms of your probation, with or without a search warrant, at any time of day or night. Such medium[s] of communication include[] text messages, voicemail messages, photographs, email accounts & other social media accounts and applications such as Snapchat, Instagram, Facebook, and Kik. You must provide access codes to Probation or any other peace officer upon request to effectuate such search." Appellant argues that this probation condition was unreasonable under *Lent*, *supra*, 15 Cal.3d 481, 486. We disagree.

When a minor is made a ward of the juvenile court and placed on probation, the court "may impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced." (Welf. & Inst. Code, § 730, subd. (b); see *id.*, § 202, subd. (b).) " 'In fashioning the conditions of probation, the juvenile court should consider the minor's entire social history in addition to the circumstances of the crime.' " (*In re R.V.* (2009) 171 Cal.App.4th 239, 246.) Although "every juvenile probation condition must be made to fit the circumstances and the minor" (*In re Binh L.* (1992) 5 Cal.App.4th 194, 203), the court has "broad discretion" in this area (*In re Josh W.* (1997) 55 Cal.App.4th 1, 5 (*Josh W.*)). We thus review the imposition of a probation condition for abuse of discretion (*People v. Olguin* (2008) 45 Cal.4th 375, 379 (*Olguin*)), taking into account "the sentencing court's stated purpose in imposing it" (*People v. Fritchey* (1992) 2 Cal.App.4th 829, 837).

A juvenile court's discretion to impose probation conditions is not without limits. (*In re D.G.* (2010) 187 Cal.App.4th 47, 52 (*D.G.*).) Under *Lent*, which applies to both juvenile and adult probationers, a condition is "invalid [if] it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality.' " (*Lent*, *supra*, 15 Cal.3d at p. 486; see *Josh W.*, *supra*, 55 Cal.App.4th at

pp. 5–6.) "This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term." (*Olguin, supra*, 45 Cal.4th at p. 379.)

There is no evidence in this case that G.H. used electronic devices or social media in connection with the theft of the cellphone or related assault, and thus imposition of the electronic search condition is not supported by the first *Lent* prong. Nor is the electronic search condition supported under the second *Lent* prong as there is no evidence G.H. was using a cellphone or electronic device to engage in other criminal behavior. (See *In re Erica R.* (2015) 240 Cal.App.4th 907, 913 (*Erica R.*) ["the typical use of electronic devices and of social media is not itself criminal."] Rather, the crux of the disagreement here is whether an electronic search condition like the one entered below is permissible because it is reasonably related to the prevention of future criminality, even if unrelated to past criminal behaviors.[2] Our division has previously found such conditions acceptable on this basis and we see no reason to depart from this precedent.

In *In re P.O.* (2016) 246 Cal.App.4th 288 (*P.O.*), we concluded that the third prong required to invalidate a probation condition was not met with respect to an electronic search condition because that condition was reasonably related to future

[2] G.H. is not the first minor to challenge imposition of an electronic search condition predicated on the future criminality prong of the *Lent* test. Numerous appellate courts have grappled with this issue and have arrived at varying results. The matter is now pending before the Supreme Court. (See, e.g., *In re Juan R.* (2018) 22 Cal.App.5th 1083, review granted July 25, 2018, S249256 [Division Five of this district upholding electronic search condition as reasonable and not overbroad]; *In re A.S.* (2016) 245 Cal.App.4th 758, review granted May 25, 2016, S233932 [Division Four of this district upholding condition]; *In re J.B.* (2015) 242 Cal.App.4th 749 [Division Three of this district striking condition as unreasonable under *Lent*]; *In re Patrick F.* (2015) 242 Cal.App.4th 104, review granted Feb. 17, 2016, S231428 [condition not stricken but found overbroad and modified by Division Five of this district]; *In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted Feb. 17, 2016, S230923 [this division finding condition reasonable but remanding for modification due to overbreadth]; *Erica R.*, *supra*, 240 Cal.App.4th 907 [Division Two of this district striking condition as unreasonable under *Lent*].)

criminality under *Olguin, supra*, 45 Cal.4th 375. In *Olguin*, our high court concluded that a probation condition requiring the probationer to disclose any pets he kept in his home enabled probation officers "to supervise [their] charges effectively" and was therefore " 'reasonably related to future criminality.' " (*Olguin*, at pp. 380–381.) The probation condition was upheld even though the condition bore "no relationship to . . . the crime of which defendant was convicted." (*Id*. at p. 380.) Applying *Olguin*'*s* analysis to the facts in *P.O.*, we concluded that the electronic search condition at issue was reasonably related to future criminality because it enabled "peace officers to review P.O.'s electronic activity for indications that P.O. has drugs or is otherwise engaged in activity in violation of his probation." (*P.O.*, at p. 295.)

The juvenile court below imposed an electronic search condition for similar reasons—to ensure effective supervision of the minor with his conditions of probation and in particular the requirements that he have no contact with his crime partner, directly or through electronic means, and that he lead a "law-abiding life." In imposing probationary terms, the juvenile court also emphasized G.H.'s abysmal school performance, which included frequent absences, poor grades, disciplinary problems, and multiple school suspensions, admonishing the minor that he must "attend school regularly."[3] As the Attorney General points out, electronic devices are a primary way that young people today communicate and catalogue their daily activities through social media. The electronic search condition enables peace officers to review G.H.'s communications and social media activity for evidence that he is in compliance with the

[3] At his current school, G.H. had 75 recorded disciplinary incidents, including referrals for leaving class early, gambling on school grounds, being disruptive or argumentative, and refusing to put his cellphone away in class. During his high school career, he had earned three A's, four B's, 10 C's, 16 D's, and 22 F's, and he was reported to be achieving less than his ability. While the disposition was pending in this case, G.H. was suspended three times, for "horseplay that 'turned violent,' " fighting, and using profanity/failing to follow teacher directives.

no-contact and school attendance orders and other conditions of probation. Since the challenged condition reasonably relates to future criminality and the reformation of a juvenile ward, we cannot say its imposition by the juvenile court constituted an abuse of discretion under *Lent*.

B. The Probation Condition Is Not Constitutionally Overbroad

G.H. further contends that the electronic search condition in this case must be narrowed or stricken because it is unconstitutionally overbroad, violating his right to privacy and to be free from unreasonable searches under the Fourth, Fifth, and Fourteenth Amendments. When a probation condition imposes limitations on a minor's constitutional rights, it " 'must closely tailor those limitations to the purpose of the condition' "—that is, the minor's reformation and rehabilitation—" 'to avoid being invalidated as unconstitutionally overbroad.' " (*Olguin, supra*, 45 Cal.4th at p. 384; see *In re Victor L.* (2010) 182 Cal.App.4th 902, 910 (*Victor L.*).) "The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the [probationer]'s constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.) Thus, " ' "[e]ven conditions which infringe on constitutional rights may not be invalid [as long as they are] tailored specifically to meet the needs of the juvenile." ' " (*In re Tyrell J.* (1994) 8 Cal.4th 68, 82, disapproved on other grounds as stated in *In re Jaime P.* (2006) 40 Cal.4th 128.)

Indeed, "[b]ecause wards are thought to be more in need of guidance and supervision than adults and have more circumscribed constitutional rights, and because the juvenile court stands in the shoes of a parent when it asserts jurisdiction over a minor, juvenile conditions 'may be broader than those pertaining to adult offenders.' " (*D.G., supra*, 187 Cal.App.4th at p. 52; see *In re Antonio R.* (2000) 78 Cal.App.4th 937, 941.) A juvenile condition of probation may be upheld even if a similar condition would be

deemed unconstitutional for an adult probationer. (*Victor L.*, *supra*, 182 Cal.App.4th at p. 910.) Whether a juvenile probation condition is unconstitutionally overbroad is a question of law we review de novo. (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143.)

In assessing the constitutionality of the electronic search condition imposed here, we do not write from a blank slate. In *P.O.*, we considered the constitutionality of an electronic search condition that required the minor to " '[s]ubmit person and any vehicle, room[,] or property, electronics including passwords under [his] control to search by Probation Officer or peace office[r] with or without a search warrant at any time of day or night.' " (*P.O.*, *supra*, 246 Cal.App.4th at p. 292.) We concluded that the electronic search condition was unconstitutionally overbroad "in its authorization of searches of cell phones and electronic accounts accessible through such devices because it [was] not narrowly tailored to its purpose of furthering his rehabilitation." (*Id.* at p. 298.) Although the juvenile court's purpose in imposing the challenged condition was to monitor P.O.'s drug involvement, the condition did not "limit the types of data that [could] be searched in light of this purpose. Instead, it permit[ted] review of all sorts of private information that [was] highly unlikely to shed any light on whether P.O. [was] complying with the other conditions of his probation, drug-related or otherwise." (*Ibid.*)

To remedy this constitutional deficiency, we modified the electronic search condition in *P.O.* to provide as follows: " 'Submit all electronic devices under your control to a search of any medium of communication reasonably likely to reveal whether you are boasting about your drug use or otherwise involved with drugs, with or without a search warrant, at any time of the day or night, and provide the probation or peace officer with any passwords necessary to access the information specified. Such media of communication include text messages, voicemail messages, photographs, e-mail accounts, and social media accounts.' " (*P.O.*, *supra*, 246 Cal.App.4th at p. 300.) The modified probation condition in *P.O.* is materially indistinguishable from the electronic search condition imposed by the juvenile court in this case. Specifically, warrantless

searches of G.H.'s electronic devices were limited to "any medium of communication reasonably likely to reveal" whether he was complying with the terms of his probation, including text messages, e-mails, photographs, and social media accounts.

We conclude the juvenile court's electronic search condition was not unconstitutionally overbroad. The monitoring of G.H.'s electronic mediums of communication was narrowly tailored to the purpose of furthering G.H.'s rehabilitation and reformation. Access to these modes of communication and social media accounts is reasonably calculated to reveal whether G.H. has abided by the no-contact order or is attending school regularly and obeying school authorities. The condition does not permit the warrantless search of other private information stored or accessible on a cellphone or electronic device such as medical records, financial records, or personal diaries, information that may have nothing to do with G.H.'s compliance with the terms of his probation. While a certain level of intrusion into his personal affairs is inescapable, the electronic search condition was sufficiently tailored to the minor's reformation and rehabilitation to survive constitutional scrutiny.

People v. Valdivia (2017) 16 Cal.App.5th 1130, review granted February 14, 2018, S245893, relied upon by G.H., is distinguishable. There, the trial court imposed an electronic storage device search condition on an adult probationer to monitor compliance with a peaceful contact order in a domestic violence case. (*Id*. at pp. 1145–1146.) The search condition did not limit the type of data that could be accessed and applied to all " 'electronic storage devices, and any object under [defendant's] control,' " including cellphones and computers. (*Id.* at p. 1135.) The appellate court, in finding the condition overbroad, expressly distinguished the peaceful contact order—which permitted the defendant to reside with his wife and interact with her peacefully—from a no contact order and found no substantial justification for an electronic search condition that was unlikely to reveal violations of a peaceful contact order. (*Id*. at pp. 1145–1147.) *Valdivia* sheds little light on the propriety of an electronic search condition imposed on a juvenile

ward that is limited to any medium of communication reasonably likely to reveal whether the minor is attending school regularly and obeying other probationary terms in furtherance of his rehabilitation.

C. Dueñas *Challenge*

We address finally an issue raised by G.H. via supplemental briefing. At the dispositional hearing in this matter, the juvenile court imposed a restitution fine of $125 pursuant to Welfare and Institutions Code section 730.6, subdivision (a)(2)(A). The trial court set the restitution amount without objection by G.H. and absent express inquiry into the minor's ability to pay. Relying on the recent appellate decision in *Dueñas*, *supra*, 30 Cal.App.5th 1157, G.H. now asserts that the restitution fine must be stayed unless and until the People can show he has the present ability to pay it.

Dueñas involved imposition of a mandatory restitution fine (§ 1202.4) and mandatory assessments (Gov. Code, § 70373; Pen. Code, § 1465.8) in an adult criminal matter. (*Dueñas*, *supra*, 30 Cal.App.5th at pp. 1161–1162.) After Dueñas was convicted of driving on a suspended license and sentenced to probation, she sought and was granted a hearing on her ability to pay the fine and assessments, but the trial court determined they were mandatory and rejected her constitutional arguments. (*Id.* at pp. 1162–1163.) The Court of Appeal reversed, concluding that due process of law requires a trial court to "conduct an ability to pay hearing and ascertain a defendant's present ability to pay" before it imposes assessments under Penal Code section 1465.8 or Government Code section 70373. (*Id.* at p. 1164.) The court additionally determined that the restitution fine imposed under section 1202.4 posed constitutional concerns because the trial court was precluded from considering ability to pay when imposing the minimum fine authorized by the statute. To avoid the constitutional problem, the court held that execution of a mandatory fine under section 1202.4 must be stayed until the defendant's ability to pay is determined. (*Id*. at pp. 1172–1173.) G.H. argues that, by analogy, the

restitution fine imposed on him by the juvenile court must also be stayed pending a hearing on his ability to pay it.

G.H. did not object in the juvenile court to imposition of the restitution fine here at issue on grounds of inability to pay. He has thus forfeited the claim before this court. (*People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153–1155 [*Dueñas* challenge forfeited by failure to object at sentencing]; see *People v. Trujillo* (2015) 60 Cal.4th 850, 853–854 [applying the forfeiture rule to an unpreserved claim regarding probation costs and the defendant's inability to pay them]; *People v. Aguilar* (2015) 60 Cal.4th 862, 864 [appellate forfeiture rule applies to various fees imposed at sentencing]; *People v. McCullough* (2013) 56 Cal.4th 589, 596–597 [holding that a defendant forfeits an appellate challenge to the sufficiency of evidence supporting a jail booking fee if the fee is not first challenged in the trial court]; *People v. Avila* (2009) 46 Cal.4th 680, 729 [rejecting argument that, since defendant did not have the ability to pay, imposition of a restitution fine under section 1202.4 was an unauthorized sentence not subject to the forfeiture rule].)

Recognizing the consequences which generally flow from such a failure to object, G.H. asserts that his forfeiture should be excused in this case because *Dueñas* represented an unforeseeable change in the law, and because imposition of the restitution fine without ascertaining his ability to pay was a purely legal error, correctible despite his failure to preserve it. (See *People v. Black* (2007) 41 Cal.4th 799, 810 [forfeiture may be excused for an unforeseeable change in law]; *People v. Scott* (1994) 9 Cal.4th 331, 354 [an "unauthorized" sentence that cannot be imposed as a matter of law is correctible on appeal without prior objection].) We need not resolve these contentions, however, because the *Dueñas* court's analysis of criminal restitution fines under section 1202.4 is inapplicable to restitution fines imposed in the juvenile court under Welfare and Institutions Code section 730.6.

Like its criminal counterpart, the juvenile restitution statute provides for a mandatory minimum restitution fine in felony cases and further states that the fine "shall be imposed regardless of the minor's inability to pay." (Welf. & Inst. Code, § 730.6, subds. (b)(1) & (c); compare § 1202.4, subds. (b) & (c).) The two statutes differ, however, in at least one important respect. Adults subject to section 1202.4 must pay the mandatory minimum fine absent "compelling and extraordinary reasons for not doing so" and an adult's "inability to pay shall not be considered a compelling and extraordinary reason not to impose" the minimum fine. (§ 1202.4, subd. (c).) In contrast, under the juvenile statute, the juvenile court must impose the restitution fine unless it finds "that there are compelling and extraordinary reasons" not to do so (Welf. & Inst. Code, § 730.6, subds. (f) & (g)(1)), but the statute does not say that a minor's inability to pay cannot be considered a "compelling and extraordinary" reason to waive the fine. (*Ibid.*) This omission must be deemed intentional given that both section 1202.4 and Welfare and Institutions Code section 730.6 are part of a single statutory scheme involving restitution fines for adult and juvenile offenders. (See *In re Enrique Z.* (1994) 30 Cal.App.4th 464, 469 [providing that a " ' " 'statute should be construed with reference to the entire statutory system of which it forms a part in such a way that harmony may be achieved among the parts' " ' "]; *id.* at p. 470 [treating adult and juvenile restitution statutes as part of a single statutory scheme].)[4]

Since we construe the juvenile statute to permit waiver of the mandatory minimum restitution fine based on inability to pay, the constitutional concerns articulated by the

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[4] Welfare and Institutions Code section 730.6 elsewhere indicates that a juvenile court retains the discretion to consider a minor's ability to pay when setting the amount of a restitution fine. Section 730.6, subdivision (d)(1), states that in setting the amount "the court shall consider any relevant factors including, but not limited to, the minor's ability to pay," and subdivision (d)(2) clarifies that "[a] minor shall bear the burden of demonstrating a lack of his or her ability to pay." (Compare § 1202.4, subd. (c) ["Inability to pay may be considered only in increasing the amount of the restitution fine in excess of the minimum."].)

Dueñas court with regards to section 1202.4 are simply not present here. Moreover, in this case the burden clearly fell on G.H. to demonstrate any inability to pay as the fine amount was set above the minimum, and he failed to object to imposition of the restitution fine or present evidence that he could not pay it. (Welf. & Inst. Code, § 730.6, subds. (d) & (g).) Under the circumstances, our ordinary forfeiture rules apply and preclude G.H. from challenging imposition of the restitution fine before this court.

III. DISPOSITION

The judgment is affirmed.

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Sanchez, J.

WE CONCUR:

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Humes, P. J.

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Banke, J.